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**SEP 26 2007**

**OFFICE OF PETITIONS**

HOXIE & ASSOCIATES LLC  
75 MAIN STREET , SUITE 301  
MILLBURN NJ 07041

In re Application of :  
Sundelin, et al. : DECISION ON PETITION  
Application No. 10/643,627 :  
Filed: August 19, 2003 :  
Atty. Dkt. No.: MPI93- :  
006CP1DV1ACN1DV1M :

This decision is in response to the petition to withdraw the holding of abandonment under 37 CFR 1.181 filed August 30, 2007 and supplemented September 7, 2007.

The petition under 37 CFR 1.181 to withdraw the holding of abandonment is hereby **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181." This is not a final agency decision.

This application became abandoned July 12, 2007 for failure to timely submit a proper reply to the Notice of Allowance (Notice) mailed April 11, 2007. The Notice set a three month statutory period of time for reply. Notice of Abandonment was mailed August 8, 2007.

Petitioners acknowledge that the issue fee transmittal (PTOL-85b), mailed July 11, 2007, indicated that a check was enclosed. The USPTO did not receive a check and petitioners acknowledge that a check was not submitted, applicants having intended to pay the issue fee and publication fee by deposit account. Petitioners failed to indicate the deposit account to which to charge the fees on the PTOL-85b. When petitioners realized the error, petitioners contacted the UPSTO Office of Patent Publication via telephone and indicate that petitioners were verbally advised to submit a supplemental paper instructing the USPTO to charge the required fees to petitioners' deposit

account. Petitioners allegedly submitted a supplemental paper to this effect on July 12, 2007 via facsimile.

On July 25, 2007, an Issue Notification was mailed. A Patent Withdrawal Notice was mailed August 7, 2007 advising of the withdrawal of the application from issue for failure to submit the issue fee.

A status request was filed August 8, 2007. The status request also requested that petitioners' deposit account be charged \$1,700.00 for the issue fee and publication fee.

The issue fee and publication fee were improperly charged to petitioners' deposit account on August 10, 2007 in response to the status request received August 8, 2007.

The supplemental petition filed September 7, 2007 requests withdrawal of the holding of abandonment on the basis that the USPTO received the issue fee and publication fee on July 11, 2007.

The issue fee and publication fee were due no later than July 11, 2007. Absent timely submission of the fees, the application became abandoned as a matter of law July 12, 2007. The USPTO is without authority to extend the period of time for submission of the issue fee and publication fee. See, 35 USC 151.

Petitioners acknowledge that no fee was submitted with the PTOL-85b on July 11, 2007. Petitioners allege that a request to charge the issue fee and publication fee to petitioners' deposit account was submitted July 12, 2007. A request to charge the issue fee and publication fee after the period of time for such submission has expired will not act to avoid abandonment.

The issue fee and publication fee were improperly charged to petitioners' deposit account in response to a status request submitted August 8, 2007. Late submission of the issue fee and publication fee after the period of time for submission of such will not act to avoid abandonment nor warrant a withdrawal of the holding of abandonment.

Petitioners have failed to establish that the issue fee and publication fee were **timely** submitted within three months of the mailing of the Notice of Allowance on April 11, 2007. Accordingly, the instant petition is subject to dismissal.

Petitioners allege that a request to charge the issue fee and publication fee was submitted via facsimile on July 12, 2007 in response to advice received from the Office of Patent Publication. Petitioners' are advised that reliance upon oral advice from USPTO employees, as alleged to have occurred, is not deemed unavoidable within the meaning of 37 CFR 1.137(a). See, generally, MPEP 711.03(c).

#### **ALTERNATE VENUE**

Petitioners are **strongly** urged to consider filing a petition stating that the delay was unintentional. Petitioners' attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

**Mail Stop Petition**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

By facsimile:

(571) 273-8300

By hand delivery:

U.S. Patent and Trademark Office  
Customer Window, **Mail Stop Petition**  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.

A handwritten signature in black ink, appearing to read 'Alesia M. Brown', written over the printed name.

Alesia M. Brown  
Petitions Attorney  
Office of Petitions